

# EXHIBIT 12

*Standing Rock Sioux Tribe v. United States Army Corps of Engineers*

Case No. 1:16-cv-1534 (JEB)

United States Army Corps of Engineers' Memorandum in Support of its Motion to Dismiss and  
in Opposition to Dakota Access, LLC's Motion for Summary Judgment



REPLY TO  
ATTENTION OF

**DEPARTMENT OF THE ARMY**  
**CORPS OF ENGINEERS, OMAHA DISTRICT**  
**1616 CAPITOL AVENUE**  
**OMAHA NE 68102-4901**

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MEMORANDUM FOR RECORD

SUBJECT: Application for an Easement for an Oil Pipeline to Cross U.S. Army Corps of Engineers-Managed Federal Land at Lake Oahe, North Dakota

1. References.

- a. 30 U.S.C. § 185, Rights-of-way for Pipelines through Federal Lands.
- b. 33 U.S.C. § 408, Taking Possession of, Use of, or Injury to Harbor or River Improvements.
- c. Engineering Regulation 405-1-12, Real Estate Handbook, September 30, 1994.
- d. Engineering Regulation 1130-2-550, Recreation Operations and Maintenance Policies, September 30, 2013.
- e. Engineering Circular 1165-2-216, Policy and Procedural Guidance for Processing Requests to Alter U.S. Army Corps of Engineers Civil Works Projects Pursuant to 33 U.S.C. 408, June 21, 2016.
- f. CEMP-CR/CECC-R, Memorandum, Subject: Real Estate Guidance Letter No. 27 – Official U.S. Army Corps of Engineers Real Estate Policy, October 29, 2008.
- g. Notice of Availability, Dakota Access Lake Oahe Crossing, December 03, 2016.

2. Purpose. The purpose of this memorandum is to document the U.S. Army Corps of Engineers (Corps) decision on the Dakota Access, LLC (Dakota Access) application for an easement to cross Corps-managed federal lands at Lake Oahe, North Dakota. See the attached Unexecuted Easement, Exhibit A, for a map of the area that would be covered by the easement.

3. Authority. Congress authorized “appropriate agency head[s]” to grant rights-of-way or easements through federal lands for oil pipelines in the Mineral Leasing Act. 30 U.S.C. § 185(a). Congress outlined how agencies were to exercise their discretion under this authority -- before granting a right-of-way, agencies must impose conditions, including requirements to control or prevent damage to the environment, public or private property, hazards to public health and safety, and measures to protect the interests of individuals living in the general area who rely on certain natural resources in the area for subsistence. 30 U.S.C. § 185(h)(2). Further,

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section 185 requires agencies to impose requirements for the operation of pipelines that “protect the public from sudden ruptures and slow degradation of the pipeline.” 30 U.S.C. § 185(g).

4. Background. The Corps received an application for an easement on October 21, 2014 from Dakota Access. Specifically, the application requested an easement for a 30-inch diameter light crude oil pipeline. The approximately 1,168 mile Dakota Access Pipeline (DAPL) will connect the Bakken and Three Forks oil production region in North Dakota to an existing crude oil market hub near Patoka, Illinois. The pipeline crosses three Corps districts: Omaha, Rock Island and St. Louis. The Corps was required to consider three categories of requests submitted by Dakota Access for: (1) individual verifications that activities at more than 200 locations along the DAPL route satisfied the terms and conditions of Nationwide Permit (NWP) 12 (under the Clean Water Act, 33 U.S.C. § 1344, or the Rivers and Harbors Act of 1899, 33 U.S.C. § 403), which authorizes activities required for the construction of utility lines in federally-regulated waters; (2) a real estate easement to lay the pipeline under a Corps-managed lake (Lake Oahe) and adjacent Corps-managed property; and (3) permissions to cross or lay the pipeline in seven locations used by the Corps for navigation or flood control under section 14 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 408 (section 408). Of the total length of the pipeline, only approximately three percent of the route is subject to Corps jurisdiction.

The pipeline would cross Lake Oahe at approximately one-half mile upstream of the northern boundary of the Standing Rock Sioux Tribe’s (SRST’s) reservation. Dakota Access would use a technique called horizontal directional drilling (HDD) to place the pipeline approximately 92 feet below the lake bed. The Corps would need to provide Dakota Access with three separate permissions for this specific crossing. Dakota Access required and received verification that the crossing meets the terms and conditions of NWP 12. Because the pipeline would cross Corps-managed property, section 408 required the Corps to “grant permission for the alteration or permanent occupation or use of [the project] when in the judgment of the Secretary such occupation or use will not be injurious to the public interest and will not impair the usefulness of such work.” 33 U.S.C. § 408. Finally, the Corps would need to grant Dakota Access an easement (*i.e.*, a “right-of-way”) because the pipeline would cross Corps-managed federal property. 30 U.S.C. § 185(a).

The Omaha District prepared environmental documentation under NEPA to support the required section 408 permission to cross Lake Oahe. The District published a draft EA on December 8, 2015, which was circulated for public comment. See 40 C.F.R. § 1508.9 (defining EAs). After reviewing the comments received, the Corps published the final EA and a Finding of No Significant Impact (FONSI) for the crossing on July 25, 2016. See 40 C.F.R. § 1508.13 (defining FONSI). The Corps must now take action on the application for an easement by Dakota Access.

5. General Policy Evaluation. The Corps evaluated the Dakota Access application as a policy matter under the Non-Recreational Outgrant Policy at ER 1130-2-550, Chapter 17.

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a. ER 1130-2-550 requires that the Corps determine that “[t]he impact associated with an individual action or the accumulated impact of a series of actions must not adversely impact the capability of the project to generate the benefits for which the project was congressionally authorized, constructed, and is operated” before granting an easement. ER 1130-2-550, paras. 17-3 and 17-9.b.(1) (2013).

The Lake Oahe project was authorized by the Flood Control Act of 1944, Public Law 78- 534, along with four other Missouri River main stem projects. The five reservoirs are elements of a plan for the development of the Missouri River main stem. The main stem plan is a component of the comprehensive river basin development program in the Missouri River Basin, the Pick-Sloan Plan. Formed from separate proposals recommended by the Bureau of Reclamation and the Corps, the Pick-Sloan Plan was one of the first plans nationwide that recognized the role of tributary basins and the importance of comprehensive planning in flood control. The Congressionally-authorized purposes of the Lake Oahe project include flood control, navigation, hydropower, recreation, water supply, and water quality.

The Omaha District found that the proposed DAPL crossing at Lake Oahe “will not impair the usefulness” of the Lake Oahe project when the District granted permission to impact the project under 33 U.S.C. 408. FONSI at p. 6 (July 25, 2016) and District Commander’s Approval of Section 408 Decision Document (July 21, 2016). This finding is supported by the Final EA that was issued on July 25, 2016 and various memoranda supporting the District Commander’s Section 408 approval. The analysis supporting the grant of permission under 33 U.S.C. 408 is adopted in support of the Corps finding that granting an easement for the pipeline to cross Lake Oahe will not adversely impact the capability of the project to generate the benefits for which the project was Congressionally authorized.

b. Corps policy is to evaluate whether the proposed easement would be “[c]onsistent with complete land use classifications and resource objectives identified in the approved project master plan.” ER 1130-2-550, para. 17-9 b.(3). The Corps has reviewed the proposed easement and has determined that it is consistent with the Final Oahe Dam/Lake Oahe Master Plan (September 2010).

c. Corps policy is to evaluate whether there is no viable alternative to utilization of public lands and waters. ER 1130-2-550, para. 17-9 b.(2). Corps policy specifically lists pipelines as examples of instances where there is no viable alternative. Here, that policy is supported by the alternatives analysis in the Final EA. See Final EA at Section 2.0, Alternatives. Accordingly, the Corps finds here that there is no viable alternative to utilization of Corps-managed public lands at Lake Oahe.

d. Corps policy requires that the grant of the easement must be consistent with the applicable appendices to ER 1130-2-550. ER 1130-2-550, para. 17-9b.(4). The applicable appendices are Appendix E, General Outgrant Application Information, Appendix F, National Environmental Policy Act (NEPA) Guidance, Appendix G, Mitigation Guidance, and Appendix H, Additional Guidance for Specific Outgrant Applications. The applicant submitted the materials that are

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required in Appendix E. The Corps' evaluation of the proposed pipeline crossing at Lake Oahe complied with NEPA requirements upon the completion of the Final EA and FONSI, thereby meeting the requirements of ER 1130-2-550, Appendix F. The easement will also comply with the mitigation guidance in Appendix G. The Final EA outlined the various mitigation measures that the applicant will undertake. Final EA at Table 8-2. Further, various mitigation measures are conditions in Unexecuted Easement. *See* Unexecuted Easement para. 2 b. and Exhibit "D," Special Conditions. The applicant complied with the portion of Appendix H relevant to oil pipelines. Appendix H, para. f, requires the applicant to make certain disclosures of ownership. The applicant made the ownership disclosures in its application and has provided updated information to the Corps as recently as December 2, 2016. *See* Dakota Access, LLC, Standard Form 299, Application for Transportation and Utility Systems and Facilities on Federal Lands, Attachment, Section I, at pp.1-2 (submitted June 29, 2015).

e. Corps policy is to grant an easement when it is in the public interest. ER 1130-2-550, para. 17-9b.(5). The Omaha District found that the proposed DAPL crossing of the Corps project at Lake Oahe "will not be injurious to the public interest" when the District granted permission to impact the project under 33 U.S.C. 408. FONSI at p. 6 and District Commander's Approval of Section 408 Decision Document (July 21, 2016). This finding is supported by the Final EA that was issued on July 25, 2016 and various memoranda supporting the District Commander's Section 408 approval. The analysis of the public interest supporting the grant of permission under 33 U.S.C. 408 is adopted in support of the Corps finding that granting an easement for the pipeline to cross Lake Oahe is in the public interest.

f. Corps policy is to determine whether the applicant has a demonstrated need for the project. ER 1130-2-550, at para. 17-9b.(6). As described in the Dakota Access application, the overall project purpose or need is to move a supply of crude oil from the Bakken and Three Forks production region in North Dakota to a crude oil market hub located near Patoka, Illinois. Dakota Access, LLC, Standard Form 299, Application for Transportation and Utility Systems and Facilities on Federal Lands, at p. 6 (submitted June 29, 2015). The overall pipeline project will improve overall safety to the public and the environment by reducing crude oil shipped by truck and by rail and significantly increase the amount shipped by pipeline. As stated above, Dakota Access has shown that there is no viable alternative to crossing the federal project. The Corps finds that the applicant has a demonstrated need for the project.

g. Corps policy is to determine whether the applicant has the technical and financial capabilities to comply with the easement's consideration, mitigation and administrative expenses. ER 1130-2-550, at para. 17-9b.(7)&(8). The applicant's parent company, Energy Transfer, has completed more than 30 capital projects over \$50 million. Energy Transfer Capital Projects in Excess of US\$ 50 million, 2006-2014 (provided Dec, 2, 2016). Many of these projects were pipelines of 30 inches or more in diameter. *Id.* The Corps finds that the parent company's completion of those projects demonstrates that the applicant possess the technical and financial capabilities to comply with the easement.

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h. Corps policy is that it will coordinate and consult with federally-recognized Native American tribes when reservation lands are involved. ER 1130-2-550, para. 17-3. The proposed DAPL crossing at Lake Oahe is not on reservation lands; therefore, by policy there is no requirement to coordinate with any federally-recognized tribe. However, the Corps reached out to the SRST to coordinate and consult on the DAPL project. As established in the analyses set forth in the Final EA, the Corps attempted to engage in meaningful discussions with the SRST on numerous occasions about the nature of the project, cultural resources, and the Lake Oahe crossing beginning in October 2014 and continuing through March 2016. Final EA at 85; see also *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-cv-01534, Memorandum Opinion Denying Plaintiff's Request for Preliminary Injunction, Docket No. 39 at 48 (D.C. Dist. Sept. 9, 2016)(finding that, on the preliminary injunction record, the Corps exceeded its NHPA obligations at many sites).

The Department of the Army also invited the SRST to engage in additional discussions about whether to grant this easement. See Letter from The Honorable Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works) to The Honorable Dave Archambault II, Chairman, Standing Rock Sioux Tribe, dated November 14, 2016. Specifically, the Army invited the SRST to engage in discussion with the Corps concerning the following topics:

- Potential conditions in an easement for the pipeline crossing, which would further reduce the risk of a spill or rupture, hasten detection and response, or otherwise enhance the protection of Lake Oahe, the Tribe's water supplies, and its treaty rights;
- With such conditions, the risk to the Tribe of a spill from the pipeline crossing Lake Oahe at the proposed location; and
- In light of such conditions, whether to grant an easement for the pipeline to cross Lake Oahe at the location currently proposed.

On November 22, 2016, the Corps extended an offer to the SRST to discuss those topics and to seek conditions that would address the Tribe's concerns. Letter from COL John W. Henderson, District Commander, to Mr. Dave Archambault II, Chairman, SRST, dated November 22, 2016. The SRST responded the following day, November 23, 2016, stating that "[t]he Tribe's fundamental position remains clear -- the easement to cross Lake Oahe at the Tribe's doorstep must be denied," but added that, "I am willing to talk further with you, including on issues relating to pipeline safety. But for such discussions to be productive, it is my view that they must take place in the context of the Tribe's basic position regarding the pipeline and the Lake Oahe crossing." Letter from Mr. Dave Archambault II, Chairman, SRST, to COL John W. Henderson, District Commander, dated November 23, 2016. In this letter, the Tribe requested that the Corps:

. . . [P]rovide the Tribe with the information sought in our expert's October 28, 2016 report. The information provided should be sure to include: 1) Comprehensive construction and design documentation that includes piping, instrumentation, control system and electrical design; 2) Documentation that lists the industry codes, standards and recommended practices that have been adopted and applied to the design,

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construction and operation of the Dakota Access Pipeline project. Include both codes and standards required by regulation and recommended practices applicable to the project adopted and applied voluntarily; 3) Material specifications including analysis of selected grade of pipe, wall thickness, pipe yield strength, corrosion allowance, ductility, pipe and weld coating systems and stress induced by installation of the pipe; and 4) Data and source materials underlying and relied on in any risk analysis. We are continuing to consult with pipeline experts who may have additional questions, but our experts cannot proceed without the fundamental baseline.

Letter from Mr. Dave Archambault II, Chairman, SRST, to COL John W. Henderson, District Commander, dated November 23, 2016.

On December 2, 2016, representatives of the SRST, Dakota Access, and the Corps met to discuss the Tribe's request, along with potential terms and conditions that could be placed in the easement.

Accordingly, the Corps finds that it provided more than adequate coordination and consultation with the federally-recognized SRST, in accordance with ER 1130-2-550, para. 17-3, despite the fact that SRST reservation lands are not involved and the SRST reservation would not be directly impacted by the easement.

i. The Corps finds that granting Dakota Access an easement for the pipeline to cross Lake Oahe would be consistent with the Corps policy on non-recreational outgrants, ER 1130-2-550, Chapter 17, and Omaha District policy.

6. Specific Statutory Findings. An easement must meet the statutory requirements of 30 U.S.C. § 185. Additionally, the grant of an easement must be consistent with Corps policy implementing that statute. See Reference 1.c., ER 405-1-12, 8-182 (1994).

a. The Corps must determine that the proposed easement will not be inconsistent with the authorized purposes of the federal project. 30 U.S.C. § 185(b)(1). As discussed above, at para. 5.a., pp.2-3, the proposed easement would not be inconsistent with the authorized purposes of the Lake Oahe project.

b. The Corps cannot grant an easement if the width of the easement exceeds 50 feet plus the ground occupied by the pipeline and related facilities, unless it is determined that a wider right of-way is necessary for operation and maintenance after construction, for protection of the environment, or for public safety. The width of the requested easement will not exceed 50 feet, plus the ground occupied by the pipeline. See attached Unexecuted Easement at p.1 (stating width of a right-of-way being 50 feet plus the ground occupied by the pipeline (that is, the pipe and its related facilities).

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c. Any special requirements for safe operation of the pipeline or related facilities should be imposed. See Exhibit D to the Unexecuted Easement containing special conditions addressed during discussions on December 2, 2016.

d. The Corps is required to impose necessary stipulations to prevent or control damage to the environment, including fish and wildlife habitat, damage to public or private property, and hazards to public health and safety; and require restoration, revegetation, and curtailment of erosion of the surface of the land when deemed appropriate. See 30 U.S.C. § 185(h)(2); ER 1130-2-550, para. 17-5, Mitigation, and App. G, Mitigation Guidance (2013). The proposed easement requires mitigation and has added special conditions to the easement to mitigate any impacts to the environment. See Unexecuted Easement, at para. 2.b., and Exhibit D to the Unexecuted Easement, Special Conditions.

e. The Corps is required by statute to obtain ownership information from the applicant. 30 U.S.C. § 185(i). The applicant made these disclosures in its application and has provided updated information to the Corps as recently as December 2, 2016. See Dakota Access, LLC, Standard Form 299, Application for Transportation and Utility Systems and Facilities on Federal Lands, Attachment, Section I, at pp.1-2 (submitted June 29, 2015).

f. The Corps is required by statute to determine whether applicant has the technical and financial capability to construct, operate, maintain, and terminate the project for which the permit or right-of-way is requested, in accordance with this law. 30 U.S.C. § 185(j). As discussed previously in this memorandum, the Corps is satisfied that the applicant has the required technical and financial capability.

g. The statute requires the Corps to provide federal, state, and local governments, as well as the public, the opportunity to comment on the easement application. 30 U.S.C. § 185(k). Corps policy is that no further comment periods are necessary if the pipeline proposal and related aspects have previously been scrutinized through NEPA procedures. ER 405-1-12, para. 8-182c.(8) (1994). The Corps provided a public comment period for the NEPA process that evaluated the DAPL crossing at Lake Oahe. Thus, this process satisfied the public comment requirement in 30 U.S.C. § 185(k). See Final EA, App. J.

h. The Corps must also include certain other conditions required by statute and policy. The grantee must pay all costs of environmental assessment and monitoring. ER 405-1-12, para. 8-182c.(5) (1994). This is included in the attached Unexecuted Easement at para. 2.c and in the Special Conditions in Exhibit D. The Corps must also be reimbursed for costs and be paid consideration for the easement. 30 U.S.C. § 185(l). This requirement is included in the attached Unexecuted Easement at para. 2.a. and 2.c. The easement cannot be for a term of more than 30 years. 30 U.S.C. § 185(n). The attached Unexecuted Easement is limited to a term of 30 years. See Unexecuted Easement at para. 1. The easement must also contain certain language about suspension or termination of the easement. 30 U.S.C. § 185(o). This requirement is included in the attached Unexecuted Easement at para. 16. The easement must also contain a condition that allows for the joint use of the easement area for other easements granted under 30 U.S.C. § 185.



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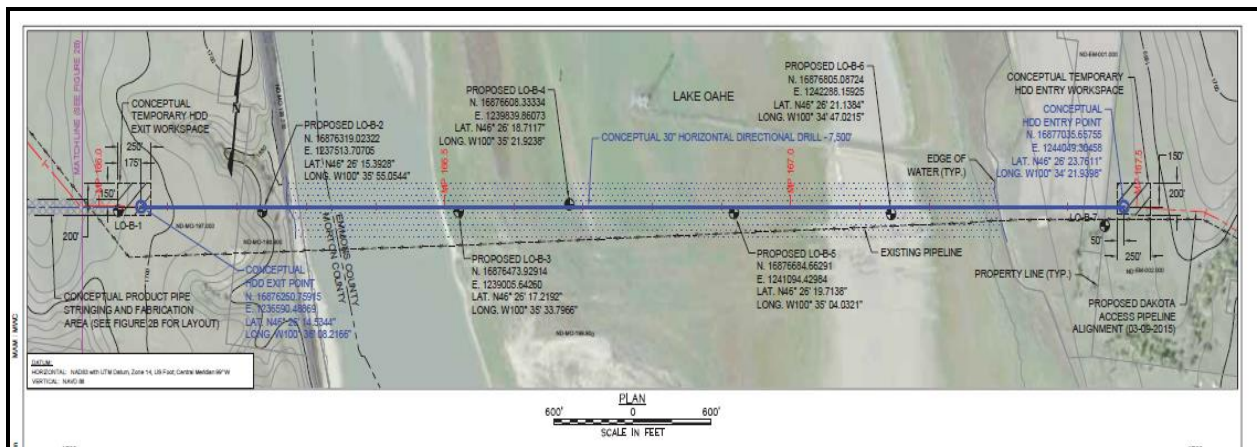
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30 U.S.C. § 185(p). This requirement is included in the attached Unexecuted Easement at para. 13. The easement must also contain certain common carrier requirements. 30 U.S.C. § 185(r). Those requirements are satisfied in the attached Unexecuted Easement at para. 6. The easement is also required to address matters concerning liability. 30 U.S.C. § 185(x); ER 405-1-12, para. 8-182c.(16). Those matters are addressed in the attached Unexecuted Easement at para. 12.

i. The District Engineer may require the holder of a license or right-of-way to furnish a satisfactory bond or other security for all or any of the obligations imposed by terms and conditions of the license, right-of-way, or regulations. This requirement is discretionary. The attached Unexecuted Easement does not include the requirement to furnish a bond or other security.

j. The Corps is required by statute and policy to consider state standards for pipeline construction where the right-of-way crosses federal and non-federal lands, and where the state standards for pipeline construction are more stringent than federal standards, the former will be required. 30 U.S.C. § 185(v); ER 405-1-12, para. 8-182c.(8) The Corps has considered the relevant state standards. *See*, for example, Final EA at 8 (discussing North Dakota residential buffer requirements) and App. M, State of North Dakota Sovereign Land Permit for the Lake Oahe Crossing, S-1951.

k. The Corps is required to utilize easements in common with other pipelines to the extent practical. 30 U.S.C. § 185(p). This proposed DAPL crossing at Lake Oahe is co-located with an existing natural gas pipeline crossing, as depicted on the following map:



Final EA at 1008.

1. Based on the foregoing information, and after reviewing the attached Unexecuted Easement, including the special conditions discussed by the applicant, Dakota Access, and representatives of the SRST, and included in Exhibit D to the Unexecuted Easement, I have determined that that issuance of the attached Unexecuted Easement to Dakota Access would be consistent with the statutory requirements at 30 U.S.C. § 185.

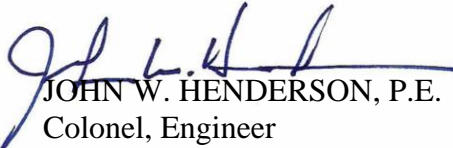
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7. The Corps of Engineers, through the Department of the Army, is required by statute to notify Congress when an application is received and when the Corps is going to grant an easement for a pipeline that is greater than 24 inches in diameter. 30 U.S.C. § 185(w). The Army notified Congress of the application on September 13, 2015. In accordance with this memorandum, I recommend that the Army notify Congress that the Corps intends to grant the attached easement to Dakota Access.

8. After notification to Congress, the Omaha District intends to execute and issue the easement to Dakota Access.

Encl

  
JOHN W. HENDERSON, P.E.  
Colonel, Engineer  
Omaha District Commander